STATE OF MICHIGAN

COURT OF APPEALS

ANN MOORE,

Plaintiff-Appellant,

v

INGHAM COUNTY PROSECUTING ATTORNEY, INGHAM COUNTY BOARD OF COMMISSIONERS, and INGHAM COUNTY,

Defendant-Appellees.

UNPUBLISHED
January 17, 2003

No. 233003
Ingham Circuit Court
LC No. 97-085142-CK

Before: Neff, P.J., Hoekstra and O'Connell, JJ.

PER CURIAM.

In this wrongful discharge case, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants. We affirm.

This case arises from the termination of plaintiff's employment as an Ingham County assistant prosecuting attorney. Relevant to this appeal, plaintiff challenged her termination in circuit court, alleging wrongful discharge and denial of due process. The trial court granted defendants' initial motion for summary disposition, but on appeal, this Court reversed and remanded, finding the grant for summary disposition premature because it was made before a former Ingham County prosecuting attorney, Donald E. Martin, had been deposed. *Moore v Ingham Co Prosecuting Attorney*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2000 (Docket No. 212994). On remand, and after that deposition had been taken, defendants renewed their motion for summary disposition. The trial court initially denied defendants' renewed motion for summary disposition; however, pursuant to defendants' request, the trial court reconsidered its ruling and thereafter granted summary disposition if favor of defendants. This appeal ensued.

Plaintiff first argues that the trial court erred in granting defendants' motion for reconsideration, and therefore their motion for summary disposition, because the motion for reconsideration presented no new issues, no new facts, and demonstrated no palpable error. Whether to grant a motion for reconsideration is within the trial court's discretion and is reviewed on appeal for abuse of discretion. *Kokx v Bylenga*, 241 Mich App 655, 658-659; 617 NW2d 368 (2000); *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Here, the trial court properly exercised its discretion to review all of the evidence and to reconsider its previous ruling. The trial court's actions clearly were within its discretion because MCR 2.119(F)(3), by its terms, does not restrict the discretion of the trial court in ruling on a motion for reconsideration. MCR 2.119(F)(3); *Sutton v Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002). As this Court previously has stated, "'[i]f a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and this court rule [MCR 2.119(F)(3)] does nothing to prevent this exercise of discretion.'" *Kokx, supra* at 659, quoting *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986). Plaintiff's argument is without merit.

Plaintiff also argues, in essence, that the trial court erred in granting summary disposition in favor of defendants because the terms of the collective bargaining agreement between defendants and the Ingham County Employees Association (ICEA) unambiguously provide for just cause employment and the prosecutors waived their statutory prerogatives. Plaintiff further contends that even if the agreement is considered ambiguous and evidence outside the agreement is considered, such evidence supports plaintiff's contention that the prosecutor is bound by the just cause language in the agreement. We disagree. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Although not expressly stated by the trial court, it is apparent that the trial court granted summary disposition pursuant to MCR 2.116(C)(10), because it considered evidence outside the pleadings.[1] *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 183-184; 551 NW2d 132 (1996). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

MCL 49.35 provides that "[s]aid assistant prosecuting attorneys and other employees appointed by said prosecuting attorney under this act shall hold office during the pleasure of the prosecuting attorney."[2] In the present case, the collective bargaining agreement, in effect for 1992 to 1996, provides:

> The Union recognizes that the Employer hereby reserves and retains, solely and exclusively, all rights to manage and operate the Employer's affairs. All rights, functions, power and authority which the Employer has not expressly and specifically abridged, amended, delegated, or modified by this Agreement are

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[1] Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10); the latter two subsections were invoked in this issue.

[2] Additionally, MCL 49.42 provides in relevant part that any assistant prosecuting attorney appointed by the prosecuting attorney with the concurrence of the circuit judge, pursuant to MCL 49.41, "shall hold his office during the pleasure of the prosecuting attorney appointing him."

> recognized by the Union as being retained and reserved by the Employer. Neither the constitutional nor the statutory rights, duties and obligations of the Employer shall in any way whatsoever be abridged unless specifically provided for under the terms of this Agreement.

The specific language in the collective bargaining agreement that is at issue here is found in article seven, entitled "Service/Seniority." Section four of that article provides in pertinent part:

> Loss of Seniority/Employment. An employee shall lose his/her seniority and job for any of the following reasons:
>
> * * *
>
> B. He/she is discharged for just cause and not reinstated[.]

From this language, plaintiff concludes that the prosecutor clearly and unmistakably waived his statutory right to have the assistant prosecutors serve at his pleasure. According to plaintiff, the just cause provision applied to seniority *and* employment. Moreover, plaintiff asserts that if defendants were true "at-will" employers, the inclusion in the collective bargaining agreement of the language at issue might be considered meaningless surplusage. Defendants maintain that the prosecutor never surrendered his statutory prerogative to have his assistant prosecutors serve at his pleasure. While agreeing that the just cause provision is unambiguous, defendants claim that it did not create just cause employment for the assistant prosecutors because the just cause provision only applied to deprivations of an employee's seniority.

Our Supreme Court has indicated that prosecuting attorneys can waive statutorily protected rights. *St Clair Prosecutor v AFSCME*, 425 Mich 204, 237, 241; 388 NW2d 231 (1986). While a contractual waiver of statutorily protected rights will not be inferred "unless the undertaking is 'explicitly stated,'" a party to a contract can waive statutorily protected rights if the waiver is "clear and unmistakable." *Amalgamated Transit Union v SEMTA*, 437 Mich 441, 460; 473 NW2d 249 (1991). According to our Supreme Court, "clear and unmistakable" is a high standard, but it does not require the use of key words, such as "waiver," to give up the statutorily protected rights. *Id.* at 463, n 16.

Here, we conclude that the trial court did not err in granting summary disposition because the collective bargaining agreement does not contain specific language that would indicate that the prosecutor clearly and unmistakably waived his statutory right, pursuant to MCL 49.35, to have the assistant prosecutors serve at his pleasure. The language at issue is found under a section of the agreement explicitly dealing only with "Service/Seniority," which are defined to relate to length of time served as an employee and length of time served within the bargaining unit; neither of these terms includes any reference to decisions involving the hiring or firing of employees. The provisions of article seven, section four appear to involve situations under which an employee's job may be terminated, voluntarily or involuntarily. It seems plain, for example, that an employee who resigns, retires, or is discharged from his or her employment will thereby lose his or her seniority. Nevertheless, although the collective bargaining agreement could be drafted better, neither article seven, section four, nor any other provision of the contract specifically indicates that assistant prosecutors are just cause employees or that an employee's

job may only be terminated for violation of one of the reasons listed in that section.[3] In other words, there is no provision that precludes the prosecutor from discharging assistant prosecutors *without* just cause. Additionally, the collective bargaining agreement lacked a grievance procedure for disciplinary actions involving assistant prosecutors short of discharge, such provisions having been eliminated in an earlier agreement, and the only grievance procedure remaining in the agreement pertained to non-disciplinary grievances arising from the collective bargaining agreement itself. Under these circumstances, we conclude that the trial court correctly granted defendants' motion for summary disposition.

Nevertheless, even considering the collective bargaining agreement ambiguous, and thus considering materials outside the agreement,[4] our conclusion that summary disposition was properly granted in favor of defendants does not change. The materials provided indicated that the prosecutor did not clearly and unmistakably waive his statutory right to have his assistant prosecutors serve at his pleasure. Indeed, after the collective bargaining agreement was ratified, Martin wrote a letter to the chief negotiator of the ICEA stating that the just cause provision only reflected terms of seniority and the assistant prosecutors were still serving at the pleasure of the prosecutor. Moreover, plaintiff's employment contract, i.e., the appointment paper that the Ingham County prosecuting attorney signed and plaintiff signed under the oath of office, specifically indicated that she would serve for a term from January 1, 1993, to December 31, 1996, "*or any portion thereof, at* [*the prosecutor's*] *pleasure*" (emphasis supplied). We find unconvincing plaintiff's argument that defendants attempted to remove the just cause language in the agreement that was causing on-going concern during each collective bargaining agreement negotiation (and which presented the potential for costly litigation such as finally occurred in this case). Evidence indicates that while the prosecutor desired to have the language removed, he continued to insist that he retained his statutory right to at-will employment for his assistant prosecutors and there was no reason to hold up the ratification of the agreement because the collective bargaining agreement continued to include the words "just cause." Additionally,

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[3] Cf *Local Union 1393 Int'l Brotherhood of Electrical Workers, AFL-CIO v Utilities Dist of Western Indiana Rural Electric Membership Co-op*, 167 F3d 1181, 1184 (CA 7, 1999):

> We do not believe that the seniority rights clause can be considered an express limitation on the right of the employer to terminate employees. A termination of employment does not necessarily also terminate seniority and therefore violate the seniority rights clause of the [collective bargaining agreement]. The right to seniority and the right to continued employment are distinct concepts that the parties to a [collective bargaining agreement] may choose to treat separately.
>
> Nor, in the context of this collective bargaining agreement, do we believe that a "just cause" limitation on management's right to discharge can be implied.

[4] "Parol evidence is not admissible to vary a contract that is clear and unambiguous . . . but may be admissible to prove the existence of an ambiguity and to clarify the meaning of an ambiguous contract." *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997) (citation omitted).

defendants further contend, and plaintiff does not dispute, that no assistant prosecutor had previously contested a job termination by claiming just cause employment. Even considering this evidence, the trial court correctly granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).

Having determined that summary disposition was properly granted in favor of defendants, we need not address plaintiff's final argument on appeal.

Affirmed.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell